

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
KENNETH TAM,
Defendant.

Case No. [5:16-cr-00401-EJD](#)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
BILL OF PARTICULARS; GRANTING
IN PART AND DENYING IN PART
MOTION FOR DISCOVERY**

Re: Dkt. Nos. 32, 33

Defendant Kenneth Tam's ("Defendant") Motion for a Bill of Particulars (Dkt. No. 32) and Motion for Discovery (Dkt. No. 33) came on for hearing on July 31, 2017. Having heard the arguments of counsel and considered the pleadings filed by both parties, the court GRANTS IN PART and DENIES IN PART Defendant's motions for the reasons explained below.

I. BACKGROUND

Defendant is charged in an Indictment returned on September 22, 2016, with the following counts: (1) Conspiracy to Commit Mail Fraud in violation of 18 U.S.C. § 1349 ("Count 1"); (2) Money Laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) ("Count 2"); (3) Structuring Financial Transactions in violation of 31 U.S.C. § 5324(a)(1) and (a)(3) ("Count 3"); and (4) False Statements to Government Agents in violation of 18 U.S.C. § 1001(a)(2) ("Count 4"). The Indictment also includes Forfeiture Allegations pursuant to 18 U.S.C. §§ 982(a)(1) and

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1 981(a)(1)(C); 28 U.S.C. § 2461(c); and 31 U.S.C. § 5317(c). Apart from Defendant, other
2 individuals were charged with similar violations in a related, but separate, Indictment.

3 The counts against Defendant arise from his alleged theft of electronic equipment from
4 CISCO Systems Inc. while he was an employee. The Government alleges Defendant sold the
5 stolen products to another individual who altered the product's serial numbers and sold them to
6 others. The Defendant allegedly received cash and checks for the stolen property and created bank
7 accounts and structured deposits and withdrawals designed to hide his identity and avoid
8 detection.

9 **II. LEGAL STANDARDS**

10 **A. Authority for Discovery Order**

11 The court has authority under the Federal Rules of Criminal Procedure, this district's
12 Criminal Local Rules, and Ninth Circuit precedent to issue orders relating to the management of
13 criminal discovery.

14 Looking first at the Federal Rules of Criminal Procedure, the court observes they "are to be
15 interpreted to provide for the just determination of every criminal proceeding, to secure simplicity
16 in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."
17 Fed. R. Crim. P. 2. Under Rule 12(b)(4), "at the arraignment or as soon afterward as practicable,"
18 the defendant may request notice of the government's intent to use any evidence that the defendant
19 may be entitled to discover under Rule 16. In turn, Rule 16 identifies particular materials that the
20 government must disclose to the defense, including the defendant's oral statements in response to
21 interrogation, as well as particular materials that are not subject to disclosure, such as statements
22 made by prospective government witnesses except as provided in the Jencks Act, 18 U.S.C. §
23 3500. Under Rule 16(d), the court, in regulating discovery, may on a finding of good cause either
24 deny, restrict, or defer discovery or inspection, or grant other appropriate relief or enter any other
25 order that is just under the circumstances.

26 Turning to the rules of this district, Criminal Local Rule 16-1 provides procedures for

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1 disclosure and discovery in criminal actions. Under Rule 16-1, the attorney for the government
2 and the attorney for the defendant shall confer within 14 days after a defendant's plea of not guilty
3 with respect to a schedule for disclosure of the information required by Federal Rule of Criminal
4 Procedure 16. The assigned Judge or Magistrate Judge may set a schedule for disclosure of
5 information required by Rule 16 or any other applicable rule, statute or case authority.

6 Additionally, the Ninth Circuit has recognized the district court's inherent power to
7 regulate and control criminal discovery. In order to effectuate the speedy and orderly
8 administration of justice, "a district court has the authority to enter pretrial case management and
9 discovery orders designed to ensure that the relevant issues to be tried are identified, that the
10 parties have an opportunity to engage in appropriate discovery and that the parties are adequately
11 and timely prepared so that the trial can proceed efficiently and intelligibly." United States v.
12 Grace, 526 F.3d 499, 508-509 (9th Cir. 2008).

13 The Government also has a separate obligation to disclose and provide exculpatory
14 information or information that impeaches the Government's case. See Brady v. Maryland, 373
15 U.S. 83 (1963). This is a continuing obligation that is self-executing. A violation of Brady occurs
16 when the Government fails to disclose evidence materially favorable to the accused.

17 **B. Bill of Particulars**

18 Rule 7(f) of the Federal Rules of Criminal Procedure provides that "[t]he court may direct
19 the government to file a bill of particulars." A bill of particulars is appropriate where a defendant
20 requires clarification in order to prepare a defense and is "designed to apprise the defendant of the
21 specific charges being presented to minimize danger of surprise at trial, to aid in preparation and
22 to protect against double jeopardy." United States v. Long, 706 F.2d 1044, 1054 (9th Cir. 1983);
23 United States v. Mitchell, 744 F.2d 701, 705 (9th Cir. 1984). The decision to require a bill of
24 particulars is within a trial court's discretion, which is broad under these circumstances. Long,
25 706 F.2d at 1054; Will v. United States, 389 U.S. 90, 99 (1967).

26 The Ninth Circuit has held that when deciding whether to order a bill of particulars, "a

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1 court should consider whether the defendant has been advised adequately of the charges through
2 the indictment and all other disclosures made by the government.” Id. However, “[a] defendant is
3 not entitled to know all the [e]vidence the government intends to produce.” United States v.
4 Giese, 597 F.2d 1170, 1181 (9th Cir. 1979) (internal citations omitted). The purposes of a bill of
5 particulars are served when “the indictment itself provides sufficient details of the charges and if
6 the Government provides full discovery to the defense.” Mitchell, 744 F.2d at 705.

7 No requirement exists in conspiracy cases for the Government to “disclose even all the
8 overt acts in furtherance of the conspiracy.” Giese, 597 F.2d. at 1180 (citing United States v.
9 Murray, 527 F.2d 401, 411 (5th Cir. 1976)); see United States v. Armocida, 515 F.2d 49, 54 (3d
10 Cir. 1975); see also United States v. Carroll, 510 F.2d 507, 509 (2d Cir. 1975). Further, the
11 Government “is not required to furnish the name[s] of all other co-conspirators in the bill of
12 particulars.” See United States v. Crayton, 357 F.3d 560, 568 (6th Cir. 2004).

13 **III. DISCUSSION**

14 **A. The Motion for Discovery**

15 At the hearing, Defendant argued that the Government failed to provide him exculpatory
16 evidence he believes the Government possess, specifically information and statements made by,
17 and in relation to, Calvin Dang, the purported “mastermind” behind the theft and fraudulent sales
18 scheme. Dang has pled guilty to charges in a separate Indictment, and was recently charged in a
19 new Indictment with additional charges, including obstruction of justice by bribery (18 U.S.C. §
20 1510(a)), contempt (18 U.S.C. §401(3)), and blackmail (18 U.S.C. § 873). Defendant states these
21 new charges against Dang stem from a conversation Dang had with an agent, during which Dang
22 admitted receiving \$250,000 from Defendant to purchase the silence of potential witnesses.

23 Defendant states no information about this investigation and new Indictment was provided to him
24 by the Government. Instead, Defendant states he discovered this information when he undertook a
25 search of the electronic docket record of Dang. Defendant believes it is more than speculative that
26 Dang will be a witness in the case against Defendant, and that the Government is in possession of

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1 statements and information that would impeach Dang. Defendant, therefore, argues this
2 information should have been disclosed previously and should be disclosed at this time.

3 In response, the Government states that Defendant has been provided almost 158,000
4 pages of discovery and that Defendant's motion seeks material already disclosed. The
5 Government also states it has informed Defendant that the information he seeks does not exist, is
6 not in the Government's possession, is not material to Defendant's guilt, and is protected work
7 product.

8 The court's rulings in relation to Defendant's nine specific discovery requests are as
9 follows:

10 1. Witness statements favorable to defendant

11 The Government indicates it has produced all items in its possession related to this request
12 including co-conspirators.

13 The Court GRANTS this request in so far as the court acknowledges the Government's
14 continued obligation under Brady.

15 2. The existence and identity of any witnesses favorable to the defense.

16 The Government indicates it has complied and will continue to fulfill its discovery
17 obligations pursuant to Brady. The government states it will identify in its trial memorandum a
18 list of all witnesses it intends to call in its case in chief, excluding witness contact information.

19 The Court GRANTS this request in so far as the Court acknowledges the Government's
20 continued obligations under Brady. However, the court does not order a disclosure of witness
21 contact information at this time.

22 3. Negative exculpatory statements

23 The Government objects to this request as overbroad and ambiguous.

24 While the Court acknowledges the Government's continued obligations under Brady, the
25 Court DENIES this request as lacking in specificity.

26 4. Any information tending to cast doubt on a witness' credibility.

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1 The Government indicates it will provide to Defendant evidence within its possession that
2 could be used to properly impeach witnesses who have been called to testify. The Government
3 will also provide information, should it exist, related to the bias, prejudice or other motivation of
4 government trial witnesses.

5 Since it appears the Government is complying with this request, the Court need not rule on
6 it at this time. It is therefore DEFERRED and Defendant may renew it at a later date.

7 5. Names of persons whom the government does not intend to call as witnesses but who
8 may have knowledge pertaining to the alleged crimes.

9 The Government objects to this request as overbroad and ambiguous. The Government
10 indicates it is aware of its obligations under Brady and it will continue to comply with its
11 obligations.

12 The Court DENIES this request as lacking in specificity.

13
14 6. Physical or documentary evidence inconsistent with the government's theory of the
15 case.

16 The Government indicates that per Rule 16(a)(1)(E), it will permit Defendant to examine,
17 inspect and copy objects and documents in its custody that are material to the preparation of the
18 defense that it intends to use in its case in chief.

19 Since it appears the Government is complying with this request, the Court need not rule on
20 it at this time. It is therefore DEFERRED and Defendant may renew it at a later date.

21 7. All promises of consideration given to a witness.

22 The Government indicates it will comply with its obligations under Giglio, and the Court
23 acknowledges the Government's continued obligations under that case.

24 Since it appears the Government is complying with this request, the Court need not rule on
25 it at this time. It is therefore DEFERRED and Defendant may renew it at a later date.

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- 1 8. Information and communications regarding proffer statements given by a witness to the
2 government, including the identities of all government representatives involved in such
3 communications or present during questioning.

4 The government indicates it has complied with this request and will continue to fulfill its
5 Jencks Act obligations.

6 The Court GRANTS this request in so far as the Government acknowledges its obligations
7 under the Jencks Act.

- 8 9. All memoranda and notes, including draft notes of witness interviews conducted by the
9 FBI or agents of the REACT task force.

10 The Government indicates it will preserve handwritten notes taken by any of its agents that
11 exist or are available at this time, per United States v. Harris, 543 F.2d 1247 (9th Cir. 1976).

12 The Court GRANTS this request in so far as the Government has indicated it will preserve
13 handwritten notes. No notes will be provided to Defendant at this time, but this request may be
14 renewed by Defendant subject to an additional showing per Rule 16(a)(1)(A).

15 The Court advises that the Government may request an in camera review of any material or
16 evidence prior to release.

17 **B. The Motion for Bill of Particulars**

18 Defendant alleges Count 1 of the Indictment suffers infirmities that require the issuance of
19 a Bill of Particulars to provide him clarity such that he can prepare a defense. Defendant also
20 alleges Count 2 fails to explain the factual basis for the allegation that funds were proceeds of
21 specified unlawful activity, and that the transaction was designed to “conceal and disguise the
22 nature, location, source, ownership and control of the proceeds of that specified unlawful activity.”

23 The Indictment contains 15 prefatory paragraphs that describe Defendant, alleged co-
24 conspirators and relevant entities, the background regarding the fraudulent sales of Cisco
25 equipment (which, as noted, is the genesis of the alleged wrongful conduct in this case), the
26 “Scheme and Artifice to Defraud.” Furthermore, paragraphs 3, 9, 11, 12 and 15 provide detail
27 regarding Defendant’s connection to and conduct with C.D., his alleged co-conspirator.

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1 Defendant requests a Bill of Particulars regarding “material omissions” that form a basis
2 for the independent duty that has been breached as alleged in Count 1 of the Indictment.
3 Defendant argues that if the Government is proceeding on a theory of material omission, the
4 Indictment lacks specificity and does not sufficiently inform him of the nature of the charge,
5 which in turn prevents him from preparing a defense to the charge. Accordingly, Defendant
6 argues the Government should identify the material omission and the independent duty assignable
7 to Defendant or strike that part of the allegations in Count 1 of the Indictment. Defendant cites
8 another case from this court, United States v. Lonich, No. 14-cr-00139-SI-1, 2016 WL 324039
9 (N.D. Cal. Jan. 27, 2016), in support of his position that “if the government wishes to prosecute
10 based upon an omissions theory, the indictment must allege that defendant owed a duty to
11 disclose.” 2016 WL 324039, at *8 (citing United States v. DuBo, 186 F.3d 1177, 1179 (9th Cir.
12 1999)).

13 Paragraphs 1 through 15, the prefatory paragraphs of the Indictment, lack a description of
14 alleged material omissions and do not describe the basis of the alleged obligation to inform as to
15 Defendant. As such, the Court GRANTS the motion as to the “material omission” allegation in
16 Count 1.

17 Should the Government wish to proceed on a theory of “material omission” as to Count 1
18 of the Indictment, it must provide additional information as to the material omission and
19 disclosure obligation related to Defendant. Alternatively, the Government may strike the
20 “material omissions” language from Count 1 and proceed with the remaining allegations.

21 Turning to Count 2, Defendant requests further explanation of the factual basis for the
22 money laundering allegation. The court finds, however, that paragraphs 3, 10, 11, 12, 13, 14 and
23 15, combined with the discovery provided to date, adequately inform Defendant as to the nature
24 and unlawful activity alleged such that he can prepare a defense. The Defendant’s request for a
25 Bill of Particulars as to Count 2 is therefore DENIED.

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Based on the foregoing, the Motion for Bill of Particulars (Dkt. No. 32) and the Motion for Discovery (Dkt. No. 33) are each GRANTED IN PART and DENIED IN PART.

Dated: August 31, 2017

EDWARD J. DAVILA
United States District Judge